

Hearing:
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Paper No. 13
JQ

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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Biofertec Ltd.

Serial Nos. 75/187,412 and 75/187,413

Peter L Costas of Pepe & Hazard for applicant.

Teresa A. Lee, Trademark Examining Attorney, Law Office 101
(Jerry Price, Managing Attorney).

Before Simms, Quinn and Hohein, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Applications have been filed by Biofertec Ltd. to
register the mark INTRA VAGINAL CULTURE for "medical
services, namely in vivo fertilization of human embryos"¹
and the mark IVC for an "in vivo fertilization kit
including vaginal tube, syringes, pipette tips, containers
and ancillary equipment for in vivo fertilization

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procedure" and "medical services, namely in vivo fertilization of human embryos."²

The Trademark Examining Attorney has refused registration in each instance under Section 2(e)(1) of the Trademark Act on the ground that the marks sought to be registered, when applied to applicant's goods and services, are merely descriptive of them.³

When the refusals to register were made final, applicant appealed. Applicant and the Examining Attorney filed briefs, and an oral hearing was held before the Board. Because of the close similarity of the issues involved in these two appeals, the Board shall explain our decisions in both of these cases in one opinion.

The Examining Attorney maintains that IVC is a recognized abbreviation for the terms "intra vaginal culture", and that the marks merely describe goods and services involving the cultivation of an embryo within the vagina. In support of the refusal, the Examining Attorney submitted dictionary listings and excerpts retrieved from the NEXIS database.

¹ Application Serial No. 75/187,412, filed October 25, 1996, based on a bona fide intention to use the mark in commerce.

² Application Serial No. 75/187,413, filed October 25, 1996, based on a bona fide intention to use the mark in commerce.

Applicant contends, in urging that the refusal be reversed, that the Examining Attorney has improperly dissected the marks, and that the marks, when considered as a whole, are not merely descriptive. Applicant also asserts that the NEXIS evidence shows that the marks are being utilized only by applicant or those associated with applicant.

It is well settled that a term is considered to be merely descriptive of goods and/or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it immediately describes an ingredient, quality, characteristic or feature thereof or if it directly conveys information regarding the nature, function, purpose or use of the goods and/or services. In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the goods and/or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or feature about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods and/or services for which

³ The Examining Attorney, in her brief, withdrew a requirement for submission of informational/promotional materials.

registration is sought. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

Given the nature of the refusal, it is important to understand the technical specifics of the goods and services involved here. Rather than comply with the Examining Attorney's requirement for literature, applicant pointed to the NEXIS evidence, stating that "[t]he services are also described in the articles which the Examiner has noted." The following NEXIS excerpt is typical in describing applicant's medical procedure:

In [applicant's] approach, ovulation is allowed to proceed naturally, with very low-level stimulation. When tests show the woman is ready to ovulate, she goes to her doctor's office, where she takes a painkiller before the doctor uses a small needle to harvest one to three eggs through the back wall of the vagina. The egg is then fertilized with the sperm and sealed in a patented plastic vial that Ranoux developed. The woman inserts the tube into her vagina, much like a tampon, where it incubates for two days. Then, the embryo is implanted in the uterus.
The Boston Globe, September 8, 1996

Applicant's procedure is contrasted with other in vitro fertilization (IVF) techniques:

Whereas, in other IVF procedures, fertilization of the egg occurs in an incubator outside the body, with IVC, the egg(s) and sperm are placed in a tube which is inserted into the mother's vaginal cavity and held in

place by a diaphragm. The benefits of this technique...are that fertilization and embryonic development occur in the natural environment of the mother's body and therefore more closely replicate a "natural" pregnancy.
Business Wire, November 28, 1988

The following is established by the record. The letters IVC are an abbreviation for "intravaginal culture."
Acronyms, Initialisms & Abbreviations Dictionary (1998).

The term "intra" is defined as "within" and the term "vaginal" is defined as "of or pertaining to the vagina."
Webster's II New Riverside University Dictionary (1988).

The term "culture" means "the propagation of mammalian cells."
Stedman's Medical Dictionary (26th ed. 1995).

The NEXIS excerpts include the following:

...the potential of a new technology called Natural Cycle Ovum Retrieval and Intravaginal Culture Fertilization (IVC)...Poorer, older, exhausted, we nevertheless agreed to one last try using IVC.
The New York Times, May 17, 1992

Hence, the most recent trend in infertility--Natural Cycle Ovum Retrieval and Intravaginal Culture Fertilization (IVC), a new and (except for its title) relatively user-friendly version of IVF.
The New York Times, March 15, 1992

A new method of fertilization, intravaginal culture (IVC), allows fertilization to occur in vivo...
The Hastings Center Report, September 1989

The first North American births,
resulting from a new in vitro
fertilization technique called IVC
(intra vaginal culture), took place
earlier this week.

Business Wire, November 28, 1988

The words/letters comprising applicant's marks have readily understood meanings as shown by the dictionary listings and the NEXIS articles. Moreover, the separate words INTRA VAGINAL CULTURE lose none of their meanings when joined to form this compound mark. There is nothing left for speculation or conjecture when the marks sought to be registered are applied to applicant's goods and services. The marks immediately describe the essence of the goods and services, namely that they involve the propagation of cells within the vagina. The fact that applicant may be the first one using INTRA VAGINAL CULTURE or IVC in the field is not dispositive. In re Central Sprinkler Co., 49 USPQ2d 1194, 1199 (TTAB 1998).

Finally, for the sake of completeness, we should point out that the instant case involves mere descriptiveness, not genericness, and that the record includes descriptive uses as shown by the NEXIS evidence. Cf. In re The American Fertility Society, Appeal No. 98-1540 (Fed. Cir. Aug. 19, 1999).

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Decision: The refusals to register are affirmed.

R. L. Simms

T. J. Quinn

G. D. Hohein
Administrative Trademark
Judges, Trademark Trial
and Appeal Board

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